Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

SEARS, ROEBUCK AND CO.,
Petitioner,

v.

NEWPORT LIMITED, a Partnership in Commendam,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the United States Court of Appeals for the Fifth Circuit may, in conflict with the recent decision of this Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, —— U.S. ——, 113 S.Ct. 2786 (1993), other decisions of this Court, and decisions of other circuits, ignore the district court's performance of its gatekeeper function in ruling that expert opinion proffered in opposition to a summary judgment motion lacked any evidentiary foundation and, instead, hold that all issues of expert credibility and reliability are jury issues?

Whether the United States Court of Appeals for the Fifth Circuit improperly ruled, in effect, that a federal court of appeals reviewing a grant of summary judgment may speculate as to evidence the opposing party might hypothetically offer at a subsequent trial, rather than limiting itself to the evidence actually proffered in opposition to the motion for summary judgment?

LIST OF PARTIES

The parties are listed in the caption. The nonwholly owned subsidiaries of petitioner, Sears, Roebuck and Co., are:

Sears Canada Inc.
Sear, Roebuck de Mexico, S.A.
Sears, Roebuck Pty. Limited (Australia)
MaxServe, Inc.
Prodigy Services
Tires Plus Co.

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PETITION FOR A WRIT OF CERTIORARI

Sears, Roebuck and Co. ("Sears") respectfully requests that a writ of certiorari issue to review the decision and judgment of the United States Court of Appeals for the Fifth Circuit, entered on October 29, 1993, and amended on January 28, 1994. The Fifth Circuit reversed a decision of the United States District Court for the Eastern District of Louisiana which had granted petitioner's motion for summary judgment. Sears' petition for rehearing and suggestion for rehearing *en banc* were denied on February 1, 1994.

OPINION BELOW

The opinion of the Fifth Circuit is officially reported as *Newport Limited v. Sears, Roebuck and Co.*, 6 F.3d 1058 (1993), *reh'g denied*, 15 F.3d 1081 (5th Cir. 1994). The court entered its opinion on October 29, 1993, but

amended it on January 28, 1994, while Sears' petition for rehearing and suggestion for rehearing *en banc* were pending. 1a; 23a.[1] The amendment consists of a "correction" to the last page of the opinion which is reprinted in the appendix to this petition, commencing at page 23a. The district court's order and reasons granting petitioner's motion for summary judgment is not reported. 25a.

JURISDICTION OF THIS COURT

Judgment was entered by the Court of Appeals for the Fifth Circuit on October 29, 1993. 1a. That opinion was amended on January 28, 1994. Petitioner's petition for rehearing and suggestion for rehearing *en banc* were denied on February 1, 1994. 56a. This Court has jurisdiction to review the judgment pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

FEDERAL RULE OF EVIDENCE 702

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

FEDERAL RULE OF EVIDENCE 703

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

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[1] References to "——a" are to the Appendix submitted with this Petition.

STATEMENT OF THE CASE

Newport Limited ("Newport") first filed its complaint in June of 1986, alleging causes of action under Louisiana state law for bad faith breach of obligations (La. Civ. Code art. 1997), detrimental reliance (La. Civ. Code art. 1967), fraud (La. Civ. Code art. 1953), and unfair trade practices (La. R.S. 51:1509). Newport alleged jurisdiction under the diversity statute, 28 U.S.C. § 1332.

In October of 1988, Newport amended its complaint to add claims for negligent misrepresentation (La. Civ. Code art. 2315) and violation of the Racketeer Influenced and Corrupt Organization Act ("RICO") (18 U.S.C. § 1961 *et seq.*) Defendant, Sears, Roebuck and Co. ("Sears"), moved to dismiss the civil RICO claim in November 1988 pursuant to Federal Rule of Civil Procedure 12(b)(6). Additionally, Sears moved for summary judgment on Newport's state law claims.

In May 1990, the district court dismissed the civil RICO claim on the merits and also dismissed, without prejudice, the pendent state law claims, noting an identity between Sears' state of incorporation and the domicile of one of Newport's several limited partners which defeated diversity of citizenship. Newport and Sears both appealed. The Fifth Circuit affirmed the finding of incomplete diversity and the dismissal of the civil RICO claim. *Newport Limited v. Sears Roebuck and Co.*, 941 F.2d 302, 308 (5th Cir. 1991), *cert. denied*, 112 S.Ct. 1175 (1992). The Fifth Circuit also held, however, that the district court had improperly abstained from exercising pendent jurisdiction and remanded the matter to the district court. *Newport*, 941 F.2d at 308. This Court denied Newport's petition for certiorari. *Newport*, 112 S.Ct. 1175 (1992).

Sears then renewed its motion for summary judgment on the state law claims. The district court granted Sears' Motion on September 9, 1992. (25a) The district court held, *inter alia*, that

> even assuming, arguendo, that liability could be imposed by any one of the asserted causes of action, the court is hardpressed to find the evidence of damages alleged; indeed, such claims find no viable support in the record.

52a. The district court further held that it could not

> ignore a duty imposed on it by law to require proof—direct or circumstantial, —but at least *some* proof—of alleged damages.

53a. (Emphasis in original.)

The only evidence proffered by Newport in support of damages took the form of letters written by its putative damages expert. 53a. These letters provided no substantiation or documentation for the opinions asserted therein. *Id.* Newport also offered excerpts from its putative expert's deposition regarding his damage calculations, but offered no evidence to substantiate that his calculations were limited to damages allegedly derived from Sears' conduct at issue. *Id.* The district court thus held that Newport failed to present evidence, "to at least some reasonable degree of certainty," that the damages claimed were caused by Sears or that any alleged damage was quantifiable. *Id.*

The Fifth Circuit recognized that Newport's only evidence regarding damages in response to Sears's motion for summary judgment was that of its expert witness. The Fifth Circuit, however, did not even address—much less dispute—the district court's finding *that none of Newport's damages evidence was viable.* Indeed, the Fifth Circuit agreed that the proffered evidence was "thin." Nevertheless, the court held that "it ordinarily is the province of the jury to gauge the expert witnesses [sic] credibility and the reliability of his data." *Newport*, 6 F.3d at 1069, as "corrected" on January 28, 1994. 22a; 24a. Thus, the Fifth Circuit reversed the summary judg-

ment, holding that Newport raised a genuine issue of material fact as to damages.

Following the Fifth Circuit's initial opinion, issued October 29, 1993, Sears petitioned for panel rehearing and also suggested rehearing *en banc*. In its suggestion for rehearing *en banc*, Sears pointed out that the district court had specifically held that Newport failed to lay the requisite foundation for the expert evidence offered on summary judgment and that none of Newport's damages "evidence" was viable. Sears also noted that the Fifth Circuit incorrectly stated the law to be that, irrespective of the issue of admissibility, "[o]rdinarily, it is the province of the jury to gauge the credibility of an expert witness and the reliability of the expert's data." In support, Sears pointed to the district court's holding that the "opinion" of Newport's expert lacked the requisite foundation and could not properly be considered in opposition to the motion for summary judgment.

After Sears filed its petition for rehearing and suggestion for rehearing *en banc*, but before they were denied, the Fifth Circuit took the highly unusual step of altering its published opinion. 23a. Thus, the Fifth Circuit "corrected" its published opinion to now state that the district court had not held Newport's expert evidence in general to be inadmissible. However, this "correction" clearly made in response to Sears' petition and suggestion, is unsupported by analysis of the district court's evidentiary rulings on the lack of damages evidence in opposition to Sears' summary judgment motion. Further, the "correction" ignores the fact that the district court had properly performed its gatekeeper function, holding that the expert evidence proffered by Newport provided no viable support for Newport's damage claims. The Fifth Circuit's ruling thus stands in sharp conflict with the decisions of this Court and other circuits.

REASONS FOR GRANTING THE WRIT

I. COURTS MUST FIRST DETERMINE WHETHER EXPERT EVIDENCE PROFFERED IN RESPONSE TO A MOTION FOR SUMMARY JUDGMENT IS ADMISSIBLE BEFORE DETERMINING WHETHER SUCH EVIDENCE CREATES A GENUINE ISSUE OF MATERIAL FACT.

This Court held in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, —— U.S. ——, 125 L.Ed. 2d 469, 113 S.Ct. 2786 (1993), that a district court reviewing expert evidence proffered in response to a motion for summary judgment must make a threshold determination regarding the admissibility of the proffered evidence. "[T]o be considered in a motion for summary judgment, the testimony must be admissible." *Porter v. Whitehall Laboratories, Inc.*, 9 F.3d 607, 612 (7th Cir. 1993). A party may offer expert opinion testimony *only* where "technical or other specialized *knowledge will assist the trier of fact* to understand the evidence or to determine a fact in issue. . . ." *Daubert*, 113 S.Ct. at 2795. (Emphasis supplied.) Moreover, this Court observed in *Daubert* that " 'knowledge' " connotes more than subjective belief or unsupported speculation. The term 'applies to any body of known facts or to any body of ideas inferred from such facts or accepted as truths on good grounds.' " *Id.* at 2795 (quoting Webster's Third New International Dictionary, p. 1252 (1986)).

Assuming that the use of expert evidence is warranted, a district court is charged with determining whether the reasoning upon which the proffered opinion is based is "of a type reasonably relied upon by experts in the field in forming opinions or inferences upon the subject." *Id.* at 2795. In other words, the district court functions as the gatekeeper, insuring that any expert evidence which is ultimately admitted is "knowledge"—not merely unsupported speculation. *Daubert* specifically admonishes that "the Rules of Evidence—especially Rule 702—do assign

the trial judge the task of ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand." *Id.* at 2799. The Seventh Circuit recently applied *Daubert* and held that expert testimony "based on subjective belief alone . . . was properly excluded under *Daubert*." *Porter*, 9 F.3d at 615. However, in stark contrast, the Fifth Circuit here flatly ignored *Daubert*'s mandate of a district court's responsibilities. In plain violation of *Daubert*, it held that all questions of the reliability of expert opinions are for the jury alone. 22a.

II. THE FIFTH CIRCUIT ABUSED ITS DISCRETION IN VIOLATION OF *DAUBERT* BY FAILING TO CONSIDER THE DISTRICT COURT'S EVIDENTIARY RULINGS.

The question on summary judgment is not whether the responding party can ever, under any circumstance, present a genuine issue of material fact. This Court has specifically and repeatedly held that a party opposing summary judgment may not rest upon mere allegations but must set forth specific facts showing a genuine issue of material fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). "[T]here must be evidence on which the jury could reasonably find for the plaintiff." *Id.* at 252. "Thus, before a district court may consider expert opinion evidence set forth in an affidavit or other evidentiary document offered in support of or in opposition to a motion for summary judgment, the court must find, among other things, that that evidence meets the requirements of Federal Rule of Evidence 702, namely, that the person who provided the evidence is 'qualified as an expert by knowledge, skill, experience, training, or education.'" *Lavespere v. Niagara Machine & Tool Works, Inc.*, 910 F.2d 167, 176 (5th Cir. 1990).

To the extent that a district court's decision to grant or deny summary judgment necessarily depends upon the admissibility of evidence offered to support or refute the motion, review of that decision is a two-tiered process. The reviewing court must first review the trial court's

evidentiary rulings under the manifest error standard. *Berry v. Armstrong Rubber Co.*, 989 F.2d 822, 824 (5th Cir. 1993). "[T]he issue of the admissibility of an expert's affidavit is distinct from the issue of whether the affidavit is sufficient to withstand a summary judgment motion." *Monks v. General Electric Co.*, 919 F.2d 1189, 1192-1193 (6th Cir. 1990); *Bieghler v. Kleppe*, 633 F.2d 531, 533-534 (9th Cir. 1980). Then, "[a]t the second level, with the record defined, we review the trial court's summary judgment decision *de novo*." *Christophersen v. Allied-Signal Corp.*, 939 F.2d 1106, 1109 (5th Cir. 1991).

One distinct basis for the district court's grant of summary judgment here was its finding that Newport failed to offer ". . . at least *some* proof—of alleged damages. This Court will not leave such determination to a jury for speculation and conjecture." 53a. (Emphasis in original.) The only damages evidence proffered by Newport consisted of two one-paragraph letters from Newport's expert stating his opinion as to the damages allegedly sustained, and the district court ruled that these letters were devoid of anything which would reflect the process by which the expert reached his subjective relief. Moreover, the deposition testimony of the putative expert failed to substantiate that the damage calculations were limited to or derivative of Sears' actions. Such putative expert "evidence" is inadmissible under *Daubert*. *Porter*, 9 F.3d at 615.

The district court's unequivocal holding that Newport's damage claims thus found "no viable support in the record" means that it necessarily found the evidence offered by Newport to be inadmissible in substance. 52a. *See Benavides v. County of Wilson*, 955 F.2d 918, 971 (5th Cir. 1992). Obviously, the district court determined that the proffered evidence did not rest upon a reliable foundation and/or failed to provide any basis upon which to gauge the foundation of that evidence. *See Benavides*, 955 F.2d at 971. "Without more than credentials and a

subjective opinion, an expert's opinion that 'it is so' is not admissible." *Id.* at 973 (quoting *Viterbo v. Dow Chemical Co.*, 826 F.2d 420, 424 (5th Cir. 1987)). As *Daubert* confirms, expert testimony that is pure speculation is not admissible. *See, Benavides*, 955 F.2d at 973. That is exactly what the district court held here.

But the Fifth Circuit, in an abuse of its discretion and in violation of the decisions of this Court and other circuits, refused to acknowledge the district court's ruling on the inadmissibility of Newport's proffered expert evidence. While it agreed, as it had to, that Newport's proffered damage evidence was "admittedly thin," 22a, the Fifth Circuit failed to address, much less disagree with, the district court's evidentiary ruling. The import of the Fifth Circuit's refusal to address the district court's evidentiary ruling is patent and grave. In a case such as this one—and there will be many more such cases—where "the contested evidence is essential to the cause of action and the trial court has excluded the evidence, we may decide the appeal at the first level solely on the basis of the soundness of the evidentiary ruling. For if we uphold the exclusion of essential evidence, the second level inquiry becomes academic." *Christophersen*, 939 F.2d at 1109. Here, however, the Fifth Circuit inexplicably refused to even acknowledge the issue.

III. THE FIFTH CIRCUIT ERRONEOUSLY BASED ITS REVERSAL OF SUMMARY JUDGMENT ON THE HYPOTHETICAL POSSIBILITY THAT PLAINTIFF, AT TRIAL, MIGHT OFFER EVIDENCE NOT PROFFERED IN RESPONSE TO SEARS' SUMMARY JUDGMENT MOTION.

In clear departure from established precedent of this Court and the circuits, the Fifth Circuit reversed a summary judgment, in effect, on the basis of hypothetical expert evidence which might—possibly, but certainly not necessarily—be offered at a subsequent trial. In other words, the substantive premise for the Fifth Circuit's re-

versal was not the evidence which was *actually* presented in opposition to summary judgment, but undefined evidence Newport *might* offer at some later date.

In its petition for rehearing and suggestion for rehearing *en banc*, Sears pointed out that the district court had held that Newport's proffered evidence on damages was inadmissible. In what can only be an "unofficial" response to Sears' petition and suggestion, the Fifth Circuit then stated, by means of "correction", that "[w]here, as here, the district court has not excluded expert evidence as inadmissible, it ordinarily is the province of the jury to gauge the expert witnesses [sic] credibility and the reliability of his data." [2] 24a.

But the Fifth Circuit did not and could not hold that the district court's ruling—that the damages evidence actually offered by Newport in opposition to the summary judgment motion was inadmissible—constituted manifest error. Essentially, it just ignored the ruling. Of course, the district court did not rule that plaintiff's expert would not be permitted to testify at trial. It never addressed that issue because it was irrelevant. What the district court did rule was that that the "evidence" proffered by Newport in response to Sears' motion for summary judgment was inadequate, unfounded, and, accordingly, inadmissible. In this regard, the district court properly performed its gatekeeper function, excluding from evidence expert opinion that was pure speculation. *See Benavides*, 955 F.2d at 973. The Fifth Circuit never even acknowledged, much less disputed, that finding, an analysis clearly required by *Daubert*. That is why the "correction" is so disingenuous and dangerous.

Daubert, Porter, Benavides, Christophersen, and many other cases constrained the district court, on summary judgment, to determine whether the expert evidence offered in opposition to the summary judgment motion met

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[2] The "correction" added "[w]here, as here, the district court has not excluded expert evidence as inadmissible. . . ." 24a.

the requirements of the Federal Rules of Evidence. "[A] mere promise to produce admissible evidence at trial does not suffice to thwart the summary judgment ax." *Garside v. Osco Drug, Inc.*, 895 F.2d 46, 49 (1st Cir. 1990). In sweeping disregard of this settled law, the Fifth Circuit unilaterally abrogated that rule, and Sears respectfully submits that this Court should not permit its rulings in *Daubert* and *Liberty Lobby* to be so flagrantly ignored and disobeyed.

CONCLUSION

For each and all of the reasons set forth above, Petitioner respectfully requests this Court to issue a Writ of Certiorari and thereafter rule that the judgment of the United States Court of Appeals for the Fifth Circuit be reversed.

Respectfully submitted,

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